

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

**STANLEY HERBERT**

Plaintiff

vs.

**MILFORD TOWING & SERVICE,  
INC., et al.**

Defendants

: CASE NO. **C-1-00-855**  
:  
: **MAGISTRATE JUDGE HOGAN**  
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**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT  
OF ITS MOTION TO AMEND**

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Defendants have filed a motion for leave to amend its answer to add the affirmative defense of failure to mitigate. The Plaintiff has not indicated any prejudice by virtue of the motion, but argues that it is untimely and that in itself is sufficient to deny the motion.

Defendants respectfully state that the failure to plead that defense affirmatively in its answer was an oversight as a result of the filing of their responsive pleading in this case. A plaintiff has a duty to mitigate and that in itself is not an affirmative defense. However, the reduction in any back pay award by the failure is one that defendants must meet.

The parties have undertaken discovery as if the affirmative defense had been pled. Plaintiff has provided W-2's and Defendants have asked questions at the Plaintiff's deposition relating to Plaintiff's subsequent employment. In fact, Plaintiff admitted he is not looking for work. There is no prejudice to the Plaintiff in Defendants' failure to plead that affirmative defense, and therefore, their motion should be granted.

RESPECTFULLY SUBMITTED,

/s/ Mark J. Byrne

**MARK J. BYRNE - #0029243**

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2003, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I also hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

James A. Hunt, Hunt  
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/s/ Mark J. Byrne

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Milford Towing & Service, Inc.